IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE SOF WASHINGTON, Respondent, v. LARRY LAMONT POWELL, Appellant.	No. 38169-9-II UNPUBLISHED OPINION

HUNT, J. – Larry Powell appeals his conviction for first degree robbery, arguing that the prosecutor engaged in misconduct and that he was denied effective assistance of counsel when his attorney failed to object to that misconduct. Finding that the misconduct was not flagrant and did not prejudice Powell, we affirm.[1]

FACTS

I. Robbery

On January 15, 2008, Amber Smith saw her ex-boyfriend, Larry Powell, as she walked from her apartment to a 7-Eleven store. According to Powell, he and Smith chatted at a 7-Eleven store, she told him he could come to her apartment because her parents were leaving, he went to Smith's apartment, he chatted briefly with Smith and her mother, and he left.

According to Smith, (1) she had no interaction with Powell at the 7-Eleven; (2) she returned to her family's apartment after purchasing an item; (3) about an hour later, after her

[1] A commissioner of this court initially considered Powell's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

parents had left, she heard a knock on the door; (4) when she answered the door, four men entered the apartment and two men remained outside; (5) Powell was one of the men who entered her apartment;(6) another man held a handgun to Smith's head for five to six minutes; and (7) the men took a PlayStation 2, some games, a laptop, a computer monitor and a computer tower.

At 5:54 pm, Smith called 911 from a neighboring apartment to report that she had been robbed at gunpoint. She identified Powell as one of the men who robbed her. A short time later, police located Powell and another man at a bus station next to the 7-Eleven. They detained Powell and found that he was in possession of a PlayStation 2 and two games.

II. Procedure

The State charged Powell with first degree robbery. Smith testified as described above. Powell testified that after talking to Smith's mother, he and his friends waited across the street until Smith's parents left and Smith motioned them to come to her apartment. Powell admitted to stealing the PlayStation 2 and the two games, but denied that any force had been used or any weapons had been displayed.

During closing arguments, Powell's attorney argued that because Smith's parents had forbade her having friends in the apartment when they (parents) were not present, Smith fabricated the story about being held at gunpoint to cover the fact that she had let Powell and his friends into the apartment after her parents left. Defense counsel conceded that the jury could find Powell guilty of second degree theft but urged the jury not to find him guilty of first degree robbery.

The State argued in closing that "[t]he State firmly believes this is not a theft in the second

degree case. This is a robbery in the first degree." The State also asked the jury to compare Smith's testimony with "the testimony of the defense witnesses who, in the State's opinion, did not appear to hold up to cross-examination. Powell's counsel did not object to either comment by the prosecutor. The jury found Powell guilty of first degree robbery.

Powell appeals.

ANALYSIS

I. Prosecutorial Misconduct

Powell first argues that the prosecutor engaged in misconduct by expressing his personal opinion about the crime committed and the credibility of the defense witnesses. We disagree.

Expressions of personal opinion by a prosecutor about the guilt of the defendant or the credibility of the witnesses are improper. *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Nevertheless, such expressions of personal opinion deprive a defendant of a fair trial only when there is a substantial likelihood that the prosecutor's comments affected the verdict. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing *Reed*, 102 Wn.2d at 147-48). And, as here, when the defendant does not object to the prosecutor's comment, he may raise the issue on appeal only when the comment was "so flagrant and ill-intentioned that [the comment] evinces an enduring and resulting prejudice that could not have been neutralized" by a curative instruction or admonition to the jury. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

We agree with Powell that the prosecutor should not have expressed his personal opinions

about what crime the jury should find he committed or about the credibility of the defense witnesses. But those comments were not flagrant or ill-intentioned. Therefore, Powell cannot challenge those comments, as reversible prosecutorial misconduct, for the first time on appeal. Accordingly, his first argument fails.

II. Ineffective Assistance of Counsel

Powell next argues that he was denied effective assistance of counsel when his trial counsel failed to object to the prosecutor's comments about the defense witnesses' handling of cross examination and that the jury should find Powell guilty of robbery instead of theft. Again, we disagree.

To demonstrate ineffective assistance of counsel, a defendant must show (1) that his trial counsel's performance was deficient, and (2) that this deficiency prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton,* 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the trial result would have been different, thereby undermining this court's confidence in the outcome. *Strickland,* 466 U.S. at 694; *In re Pers. Restraint of Pirtle,* 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If a defendant fails to establish either element, we need not address the other element because an ineffective assistance of counsel claim fails without proof of both elements. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Such is the case here.

As addressed above, while the prosecutor's comments were inartful, Powell fails to show a reasonable probability that the result of his trial would have been different had his counsel objected to those comments. The trial was largely a credibility contest between Smith and Powell. The jury apparently believed Smith. Defense counsel's failure to object to the prosecutor's comments about the proper degree of the charged crime did not affect this decision. We hold, therefore, that Powell does not demonstrate that he was denied effective assistance of counsel.

We affirm Powell's judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Hunt, J.

We concur:

Bridgewater, J.

Van Deren, A.C.J.